

JOHN WILLIAMS ET AL.

IBLA 94-904, 94-905

Decided June 11, 1997

Appeals from Decisions by the Prineville, Oregon, District Office, Bureau of Land Management, requiring payment of trespass damages for timber trespass. OR-056-04-613, OR-056-04-614.

Affirmed in part and set aside in part.

1. Trespass: Generally--Trespass: Measure of Damages

When several persons participate in a timber trespass, BLM properly finds all those participating in the trespass responsible.

APPEARANCES: Gerald A. Martin, Esq., Bend, Oregon, for John Williams, d.b.a. Quicksilver Contracting; Dennis M. Odman, Esq., Portland, Oregon, for the Inez T. Kellems Trust, Randolph T. Kellems, Sr., and Bank of America.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

John Williams, d.b.a. Quicksilver Contracting (Quicksilver), Inez T. Kellems Trust (Trust), Bank of America, Trustee, and Randolph T. Kellems, Sr., Trustee, have appealed from separate trespass Decisions issued on August 8, 1994, by the Prineville District Office, Bureau of Land Management (BLM), finding Williams, Quicksilver, Randolph T. Kellems, Sr., and Jr., and Bank of America responsible for damages resulting from unauthorized removal of timber on Federal lands and assessing each of them a bill for collection of \$19,795.78.

According to a BLM valuation memorandum dated September 26, 1994, the trespass area is "located adjacent to the Paulina Creek tract of the Kelldano Ranch properties in the NW $\frac{1}{4}$, sec. 30, T. 21 S., R. 11 E., in Deschutes County, Oregon." A sketch of the area prepared by BLM forester Steve Castillo reveals Federal lands affected by the trespass are in the S $\frac{1}{2}$ NW $\frac{1}{4}$ of sec. 30. A fence cuts diagonally across the N $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$, but does not mark the BLM boundary, which lies northeast of the fence line. See Castillo Report dated June 30, 1994.

Castillo learned of the trespass on June 6, 1994, when he received a telephone call from Vic Musselman, of Musselman and Associates, forestry consultants to the Kelldano Ranch. Musselman reported that Crown Pacific,

Ltd., a purchaser of logs from Kelldano, notified him of a purchase order for payment of a load of logs naming Randy Kellems, Jr., as ranch manager. Crown Pacific, Ltd., questioned whether Randy Kellems, Jr., was authorized to remove timber from the ranch. Castillo investigated and learned that Randy Kellems, Jr., who had been residing on the ranch, had contracted with Quicksilver to remove timber. It appeared that Quicksilver logged the property, including 11.5 acres of public lands adjacent to the Kellems property, sometime between April 18 and May 13, 1994. (Castillo Notes dated July 1, 1994.)

On June 8, Castillo met with Musselman and his associate Joseph Kaliszewski at the ranch. They verified property lines on the ground using "compass shots and pacing, and photo interpretation from two known cadastral survey corners." See Castillo Notes dated June 8, 1994. Castillo observed that approximately 11.5 acres of Federal lodgepole timber "on flat terrain adjacent to the Paulina Creek Meadow/flood plain" had been logged. (Valuation Memorandum dated Sept. 26, 1994.) The quantity of timber removed was determined by Castillo and Kaliszewski, who made a 100-percent joint stump cruise. It was estimated that 52.3 thousand board feet (MBF) of timber was removed, comprised of 1.9 MBF dead and 50.4 MBF green material. To determine value, Castillo used a "hybrid transaction evidence/market value appraisal process" and the "Oregon Department of Revenue Eastern Oregon Severance Tax Schedule of Immediate Harvest Values for southern Deschutes County." (Valuation Memorandum at 3.) He priced the dead logs at \$56.94 per MBF, for a total cash value of \$108.19. Green logs were appraised at \$194.42 per MBF, for a value equivalent to \$9,789.70. The result was a computed total loss to BLM of \$9,897.89.

Bills for collection dated August 5, 1994, were forwarded to John Williams, Quicksilver, Randolph T. Kellems, Sr. (c/o Robert Magee), Randy Kellems, Jr., and Bank of America. Double damages were assessed, and the total amount due was calculated at \$19,795.78, pursuant to 43 C.F.R. § 9339.1-3(a)(3), a regulation setting the measure of damages for timber trespasses not considered to be willful. Trespass Decisions dated August 8, 1994, were sent to the same parties. Both Williams and Bank of America appealed. On September 27, 1994, BLM issued bills for collection to three lumber companies--Crown Pacific, Ltd., Northwest Pine Products, Inc., and Central Point--to whom Quicksilver sold the Kelldano logs. Each company was billed \$9,789.70, the total estimated value of the logs removed.

Williams does not concede that trees on Federal land were cut. He claims that he was directed by Kellems to cut timber on the ranch and did not "cut any trees beyond the boundaries as laid out by the property owner or the property owner's representative." He argues that "[i]f any trespass has been committed, it is the responsibility of the property owner and not this Appellant." Williams maintains that he asked a BLM employee, who was on the property during cutting, to confirm Federal boundaries and that he refused to cooperate. Moreover, he contends, if a trespass occurred, it was unintentional, and BLM should not assess penalties against Williams or Quicksilver.

Attorneys for the Bank of America have entered an appearance on behalf of Kelldano Ranch and the Trust. They claim that "Randolph T. Kellems, Sr. and Bank of America are improperly named as 'payer[s]' under the bill[s] for collection," because they do not hold title to the Kelldano Ranch. They argue that Randolph T. Kellems, Sr., and the Bank of America "have no personal liability in their individual capacities under the Trespass Decision," because "[t]itle to the Kelldano Ranch is in the Trust" and the parties named are Trustees. They point out that the Kelldano Ranch has not been named a party to the appeal. It is correct that the Bank of America was served with a trespass decision and bill for collection naming Randolph T. Kellems, Sr., and the Bank of America (Trustees of Inez T. Kellems Trust), and Randy Kellems, Jr. (beneficiary of the Trust) as parties. The contention that the Trust is the party properly before us, not the Bank of America or Randolph T. Kellems, Sr., is accepted; we modify BLM's Decision by substituting the Inez T. Kellems Trust for Randolph T. Kellems, Sr., and the Bank of America.

The Trust argues that "[t]he Kelldano Ranch, the Trust, Randolph T. Kellems, Sr. and Bank of America, either collectively or individually, did not authorize or consent to the timber trespass and unauthorized cutting referenced in the Trespass Decision." The Trust claims that responsibility for the trespass, if any occurred, lies with Quicksilver.

[1] Neither Williams nor the Trust has conceded that trees were cut from BLM land by their representatives. Nonetheless, there has been no showing that BLM's findings concerning the trespass and the value of the timber taken are in error, nor does the record contain irregularities tending to establish that the facts of timber cutting and removal are other than reported by BLM. Under 43 C.F.R. § 9239.0-7, the unauthorized removal of timber from public lands under the jurisdiction of the Department of the Interior is an act of trespass; when timber is removed without permission from Federally-owned lands, BLM properly finds that action to be a trespass. Fred Wolske, d.b.a. F.K.W. Logging Co., 137 IBLA 211 (1996).

During the investigation, Castillo attempted to contact Randolph T. Kellems, Sr., and Jr., without success. He did interview Williams, who stated that his standard contract provides the landowner is responsible for identifying boundaries; the contract was not, however, produced, (Castillo Notes dated June 27, 1994), and is not now before us. Before logging, Quicksilver applied for an operating permit from the Oregon Department of Forestry. That application gives the correct legal description of the property and does not describe BLM lands. Castillo also interviewed Roy Carver and Jim Mauch, who worked for Williams, by telephone on August 3, 1994. Both Mauch and Carver reported that Randy Kellems, Jr., claimed to have authority to log the ranch and told them that the Kelldano boundary extended all the way back to the fence. Mauch and Carver told Castillo they accepted this statement as fact because there were blazes on the fence posts, but Castillo found no such blazes when he investigated the trespass.

Under these circumstances, we find the determination that Williams, Quicksilver and Randy Kellems, Jr., are responsible for the timber trespass

in which they participated is supported by the record. Nothing has been offered tending to contradict the finding by BLM that Williams and Randy Kellems, Jr., acted in trespass by cutting and removing BLM timber. We therefore find them responsible for the trespass, although apportionment of damages between them (or among all those included in the transaction and billed by BLM) lies outside this Board's jurisdiction. Insofar as the Trust is concerned, however, the record before us is insufficient to support a finding that the Trust participated in the trespass; the determinations that the Trust, Randolph T. Kellems, Sr., or the Bank of America were responsible for the trespass must therefore be set aside.

Since no one has taken issue with the details of BLM's assessment of liability, and there is no suggestion of error in the findings made by BLM on that account, the damage assessment is properly affirmed. See Michael and Karen Rodgers, 137 IBLA 131, 135 (1996). To the extent not otherwise directly addressed herein, all other arguments raised by the parties have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed except as modified by this opinion.

Franklin D. Arness
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge